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that it pursues those health problems detected with the necessary treatment In our view, the defendants have relied too heavily on their previous Medicaid program and have failed to comply with federal law

We therefore reverse the judgment of the district court and remand for proceedings consistent with this opinion [10] In deciding this case, we have relied on the regulations and guidelines in effect at the time the district judge entered his order in August 1976. Since that time, more detailed regulations have been issued Because nearly five years have elapsed between the 1976 judgment and the issuance of this opinion, and in the interest of both justice and judicial economy, the district judge on remand should assess Indiana's resubmitted plan according to currently applicable federal law.

BLOOMER SHIPPERS ASSOCIATION, et al., Plaintiffs-Appellants,

v.

ILLINOIS CENTRAL GULF RAILROAD COMPANY, Defendant-Appellee.

No. 80–2517.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 24, 1981.

Decided July 28, 1981.

An order of the United States District Court for the Central District of Illinois, Danville Division, Harold Albert Baker, J., granted summary judgment in favor of defendant carrier as against a shippers' association and other plaintiffs The Court of Appeals, Cummings, Chief Judge, held that Congress intended that aggrieved shipper should seek relief, as to abandonments, in first instance from Interstate Commerce Commission, and proper remedy for plaintiffs after carrier's actions have been approved by Commission lies in suit to review

10. We cannot say on what basis the district judge concluded that Indiana's program was in compliance because he set out no findings of fact He did note, however, a June 1976 regional HEW audit which found that Indiana's EPSDT program met the requirements of 45 C.F.R § 205.146(c) and recommended that no penalty be assessed

In September 1976, however, after the regional audit was reviewed by the national office, HEW Commissioner Keith Weikel informed Regional Commissioner Clyde Downing "[W]e have reviewed the above reports and have identified penalty issues in each of the quarters in question. We have referred the reports to the office of General Counsel for opinion " Beatrice Moore, Director of the Division of EPSDT, wrote to the Assistant General Counsel

> A review has been made of the [regional audit] We do not concur with the Regional Office's assessment that the State was in compliance with the penalty regulation The report indicated obvious penalty liability under 45 C.F R § 205.146(c) of treatment arrangements

Finally, in April 1977, the Office of the General Counsel issued its report entitled "Indiana EPSDT Penalty Report—Second and Third Quarter FY 1976".

> On the basis of a review conducted by the Regional Staff, MSA has concluded that the one percent penalty authorized by section 403(g) of the Social Security Act be assessed against Indiana for its failure to comply with pertinent requirements for treating eligible children We concur in MSA's conclusion

The defendants point out that the record contains no official HEW document showing that Indiana was actually assessed a penalty for the period in 1976 up to and including August 1976 We respond by noting first our prior holding that injunctive relief can issue without an administrative penalty, 504 F 2d at 1251, and second Justice Douglas's statement in *Rosado v Wyman*, 397 U S. 397, 426, 90 S Ct 1207, 1225, 25 L Ed.2d 442 (1970) (Douglas, J., concurring)·

> HEW has been extremely reluctant to apply the drastic sanction of cutting off funds to States that are not complying with federal law Instead, HEW usually settles its differences with the offending States through informal negotiations

The short-term effect of a reduction in federal funding is of course to exacerbate the problem facing Indiana's needy children

Commission's order denying damages and approving abandonment

Affirmed.

1. **Federal Courts** ⟹752

Though first complaint count had been replaced by substitute, Court of Appeals would consider validity of original count, on which plaintiffs principally rested their appeal, in view of fact that substitute had been imposed by court's force majeure and without plaintiffs' waiving validity of original count one

2. **Civil Rights** ⟹13.5(4)

Although railroad was heavily regulated utility, there was not sufficiently close nexus between state and challenged actions of the regulated entity that actions of latter could be fairly treated as that of state itself for purposes of 1871 civil rights statute, "state action" being not found in monopoly status, in obligation to furnish service, in fact that carrier was business affected with public interest, that it terminated service to plaintiffs or that it exercised choice allowed by state, initiative having come from carrier. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

3. **Civil Rights** ⟹13.5(2)

Use of courthouse is not "state action" for purposes of 1871 civil rights statute, and thus carrier's forcible entry and detainer action did not satisfy the statute. 42 U.S.C.A § 1983

4. **Civil Rights** ⟹13.12(3)

Where general order of State Commerce Commission did not require filing or approval with respect to real estate sales and leases in amounts involved, plaintiffs' allegations about those subjects failed to show "state action" for purposes of 1871 civil rights statute. 42 U.S.C.A. § 1983.

5. **Federal Civil Procedure** ⟹2011

Plaintiffs' motion to strike supplemental evidence was denied where plaintiffs had forcibly replied to such matter and it had been submitted at request of court.

6. **Judgment** ⟹654, 715(1)

Case which had earlier arisen on complaint filed by United States Department of Justice and Interstate Commerce Commission and had resulted, pursuant to settlement agreement, in permanent injunction prohibiting carrier from terminating service to shipper until authorized to do so by Commission resulted in final adjudication on merits, triggering doctrine of res judicata, where conduct complained of in subsequent suit was precisely same and complaint in earlier suit had been dismissed with prejudice and plaintiffs failed in earlier suit to seek postjudgment relief from final order.

7. **Railroads** ⟹225

Other parties had no right to complain of termination of rail service to particular shipper, which was only shipper whose rail service had already been terminated by defendant carrier Revised Interstate Commerce Act, 49 U.S.C.A §§ 10741(b), 10903.

8. **Carriers** ⟹18(1)

Revised Interstate Commerce Act section providing that carrier defense of "necessary in the public interest" does not legalize competitive practice that is otherwise unfair, destructive, predatory or undermining of competition has interpretative purpose only and does not contain prohibitions from which private cause of action can be implied. Revised Interstate Commerce Act, 49 U.S.C.A. § 10711.

9. **Carriers** ⟹18(1)

Revised Interstate Commerce Act sections making it crime for carrier to practice discrimination and for person to give to railroad employee, or railroad employee to receive, "anything of value" intended to influence action related to supply, distribution or movement of cars, vehicles or vessels used in transportation of property are purely criminal, and private causes of action are not implied. Revised Interstate Commerce Act, 49 U.S.C.A. §§ 10501, 10741, 10741(a, b), 10903, 10904(a)(2)(B), 10905, 11101, 11903, 11907; 49 U.S.C. (1976 Ed.) §§ 41(1), 43.

III

[6, 7] Count I of plaintiffs' amended complaint asserts a claim for relief based on the Interstate Commerce Act (Act) for Illinois Central's refusal to service plaintiff Anchor Grain Company from January to March 1978. The district court held that to the extent such claim is cognizable under the Act,[3] it is barred by the doctrine of *res judicata* because of Judge Ackerman's 1979 order in Case No 78–C–3025. As noted earlier, that case arose on a complaint filed by the United States Department of Justice and the Interstate Commerce Commission and resulted, pursuant to a settlement agreement, in a permanent injunction prohibiting Illinois Central from terminating service to Anchor Grain until authorized to do so by the Commission The conduct complained of in the present suit is precisely the same conduct that was at issue in the first suit Anchor Grain and certain shippers who are plaintiffs here intervened in that action, and their complaint seeking damages and injunctive relief was dismissed with prejudice on January 4, 1979 This was a final adjudication on the merits, triggering the doctrine of *res judicata* *Martino v. McDonald's System, Inc*, 598 F.2d 1079 (7th Cir. 1979).

Plaintiffs, having failed to seek post-judgment relief from Judge Ackerman's final order, now argue that *res judicata* is inappropriate because they did not have a full opportunity to present evidence in the first proceeding, because they did not stipulate that they were waiving any future actions against Illinois Central and because their complaint was erroneously dismissed with prejudice. However, it is elementary that a "judgment on the merits [is] an absolute bar to relitigation between the parties and those in privity with them of every matter offered and received to sustain or defeat a claim and to every matter which might have been received for that purpose." *Martino v McDonald's System, Inc., supra*, 598 F.2d at 1083. Thus as to those with standing the district court correctly entered summary judgment in favor of Illinois Central on the claims arising from the subject matter before Judge Ackerman in the earlier litigation

[8, 9] Count I of the amended complaint also asserts claims for damages and injunctive relief on the basis of 49 U.S.C. §§ 10711, 10741, 11101, 10904(a)(2)(B), 11903 and 11907 for Illinois Central's allegedly retaliatory leasing practices. Judge Baker held that Sections 10741 and 11101 are wholly inapplicable to the wrongs alleged[4] and that none of the remaining provisions expressly or impliedly creates a private

3. The district court stated that Anchor Grain Company had standing under 49 U S C § 10903, which requires a carrier to secure the Commission's permission before terminating any rail service and arguably under 49 U S C § 10741(b), which prohibits carriers providing transportation or "service subject to the jurisdiction of the Commission" from unreasonably discriminating against customers

Some of the plaintiffs before Judge Baker were not involved in the earlier case before Judge Ackerman, but Count I of the complaint before Judge Baker complained of Illinois Central Gulf's lease cancellations, and threatened lease cancellations were also involved before Judge Ackerman Assuming *arguendo* that their privity does not bar the additional plaintiffs under the doctrine of *res judicata*, they have no standing to assert a violation of 49 U S.C § 10903 because, as Judge Baker properly held, they have no right to complain of the termination of rail service to the Anchor Grain Company, the only shipper whose rail service had already been terminated by defendant (App 5)

4. Section 10741(a) prohibits a carrier from charging one customer "different compensation" for a service rendered "in transportation" than it charges others for like service Section 10741(b), as noted *supra* note 3, prohibits unreasonable discrimination by carriers providing transportation or "service subject to the jurisdiction of the Commission." Section 11101 requires a carrier providing transportation or "service subject to the jurisdiction of the Commission" to provide the transportation or service "on reasonable request" The Commission's jurisdiction under the Act is confined to "transportation." 49 U S.C § 10501. "Transportation" as defined in 49 U S.C § 10501 refers only to the movement of passengers or property or such directly related services as the receipt and storage of goods Judge Baker concluded that Congress did not intend "transportation" to include such proprietary activities as a carrier's arrangements with its lessees